No. 24-43

IN THE

Supreme Court of the United States

WEST VIRGINIA, *et al.*,

Petitioners,

v.

B. P. J., BY HER NEXT FRIEND
AND MOTHER, HEATHER JACKSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF EQUAL PROTECTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The Equal Protection Project (EPP), a project of the non-profit Legal Insurrection Foundation, is dedicated to the fair treatment of all persons without regard to race, ethnicity, or sex. EPP's guiding principle is that there is no "good" form of unlawful discrimination. The remedy for unlawful discrimination is never more unlawful discrimination.

Since its creation, EPP has filed civil rights complaints against more than one hundred twenty governmental or federally funded entities that have engaged in alleged discriminatory conduct in more than five hundred fifty discriminatory programs. EPP has also previously filed briefs *amicus curiae* before this Court. *See*, *e.g.*, *First Choice Women's Res. Centers, Inc. v. Platkin*, No. 24-781, 2025 WL 1678987, at *1 (June 16, 2025); *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2025 WL 815221 (Mar. 10, 2025); *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 2022 WL 2919681 (May 9, 2022). EPP's participation in this case will focus on providing the Court with additional information and context regarding the current stakes for sex-based discrimination in education.

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1. No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether West Virginia may, consistent with the Fourteenth Amendment and Title IX, protect women's athletics by requiring that participation on female sports teams be limited to biological females.

Amicus EPP submits that the answer is yes.

Equal protection jurisprudence has always recognized that classifications must be anchored in reality. That is to say, differential treatment must be based on meaningful differences. Thus, whenever this Court examined whether a law distinguishes between "men" and "women," it presupposes that these are stable, objective, biological categories. That presupposition is not arbitrary, but instead reflects undeniable physiological difference recognized for time immemorial.

An alternative subjective and fluid standard is unworkable. If sex is redefined as subjective identity based on shifting psychology, rather than biological fact, equal protection doctrine in the context of sex classifications loses all coherence. Courts would no longer be equipped to assess whether a classification was "based on sex," because the category itself would be meaningless. Laws and policies could be evaded by intentional redefinition, rendering judicial scrutiny toothless. Worse, by ignoring biological differences in athletics, courts would invite the very inequality Title IX was meant to cure. Biological women will be excluded from opportunities because they cannot fairly compete against biological men.

For these and the reasons discussed by the Petitioner-Defendants, this Court should reverse the Fourth Circuit and protect women's rights.

ARGUMENT

I.

Replacing biological sex with a fluid subjective identity renders equal protection unworkable.

Like the other forty-nine states, West Virginia schools offer separate sports teams based on biological sex. In the Save Women's Sports Act, the state went a step further by making clear that female sport's teams based on competitive skill or involving contact sports,[2] should be open only to biological women. The West Virginia Legislature rightly concluded that biological boys should compete on boys' and co-ed teams but not girls' teams because of the inherent physical differences between biological males and biological females.

This distinction is well-supported.

Both the Fourteenth Amendment's Equal Protection Clause, and Title IX of the Education Amendments of 1972 rely on stable, reality-based categories. Just as strict scrutiny of race-based classifications requires courts to know what "race" means in law, intermediate scrutiny of sex-based classifications requires courts to know what "male" and "female" mean. To abandon that presupposition would not expand equality, it would obliterate it.

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2. This language tracks Title IX's enforcement regulations exactly. 34 C.F.R. § 106.41(b).

Intermediate scrutiny allows sex-based classifications where they serve important governmental objectives and are substantially related to achieving those objectives. *United States v. Skrmetti*, 145 S. Ct. 1816, 1828 (2025). This framework depends on the recognition that, in some circumstances, biological differences between the sexes are not only real but legally relevant. The government cannot conjure stereotypes to justify unequal treatment, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), but it can acknowledge actual physiological differences that bear directly on the matter at hand.

In athletics, those differences are decisive.

Title IX's structure depends on distinguishing male from female for the purpose of allocating athletic opportunities. Without this commonsense distinction, schools would be unable to enforce roster limits, scholarships, or even eligibility rules.[3] The very mechanism Congress designed to protect women's access to athletics would thus be inverted, turning a statute meant to safeguard female participation into one that displaces it.

Scientific consensus has long established that males, on average, possess significant physical advantages after puberty.[4] These include greater muscle mass, higher

3. NCAA, *Title IX Frequently Asked Questions* (Jan. 27, 2014), https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx (last visited Sept. 1, 2025).

4. American College of Sports Medicine, *Biological Basis of Sex Differences in Athletic Performance: Expert Consensus Statement*, https://www.acsm.org/biological-basis-sex-differences-athletic-performance (last visited Sept. 12, 2025).

hemoglobin levels that increase oxygen transport, larger heart and lung capacity, denser bone structure, and faster rates of recovery. Studies consistently show that elite male athletes outperform elite female athletes by margins of 10–12% in running and swimming events, and by even larger margins in jumping, throwing, and weightlifting. These differences persist even when training intensity is controlled, and they are not erased by hormone therapy or transition treatments.[5]

The International Olympic Committee and other sporting bodies have acknowledged these differences in setting eligibility standards, underscoring that male physiology confers durable advantages that cannot be fully mitigated.[6] Courts, too, have relied on such realities in upholding sex-based athletic distinctions. The recognition is not a value judgment—it is a fact necessary to ensure fairness for women. The ripple effects would extend into other areas of law and policy.

Prisons, shelters, restrooms, and locker rooms—all contexts where sex separation has long been recognized as permissible for reasons of privacy, safety, and fairness—would be destabilized. Agencies tasked with enforcing

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5. David J. Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, (2018), https://pmc.ncbi.nlm.nih.gov/articles/PMC6391653/ (last visited Sept. 12, 2025).

6. Tommy R. Lundberg, Ross Tucker & Emma N. Hilton, *The International Olympic Committee Framework on Fairness, Inclusion and Nondiscrimination on the Basis of Gender Identity and Sex Variations Does Not Protect Fairness for Female Athletes*, Scand. J. Med. Sci. Sports (2024), https://doi.org/10.1111/sms.14581 (last visited Sept. 12, 2025).

nondiscrimination law would lack an administrable standard. Employers and schools would face conflicting obligations, sued both for separating and for failing to separate by sex. Courts would be drawn into endless disputes over identity claims, with no stable reference point in biology to resolve them.

If "sex" becomes a self-declared status, the judiciary loses its ability to apply scrutiny in any consistent or principled way. Equal protection is designed to cabin arbitrary distinctions, not to eliminate *all* distinctions. When categories reflect real and relevant differences, they provide the framework within which equality can flourish. To treat sex as a matter of self-identification is to untether law from fact. It replaces a workable standard with a fluid one that varies from person to person, day to day, and case to case. The result is not equality but uncertainty. The Constitution does not demand and cannot sustain such instability.

The Fourth Circuit should be reversed and women's rights protected.

II.

Title IX was premised on biological distinctions to ensure equal opportunity for women.

In the case below, a parent sued on behalf of her child, B.P.J., arguing that the West Virginia must allow biological boys who identify as girls to compete on girls' teams. After the Fourth Circuit agreed and granted the requested injunction, B.P.J. then beat out and displaced hundreds of girls in track and field.

But Title IX's entire purpose was to give women an equal playing field.

Congress recognized—and this Court's jurisprudence and the Department of Education's Title IX regulations confirm—that equality requires laws to account for real differences, not pretend they do not exist. Acknowledging biological differences does not demean women. On the contrary, it is the condition of their legal equality. By creating female-only teams, Congress ensured that women would have a meaningful chance to compete and excel in sports.

Before 1972, women were not absent from athletics because of lack of interest or ability, but because systemic barriers. When Congress enacted Title IX in 1972, women and girls had been excluded from meaningful participation in athletics for generations. The disparity was not incidental; it was entrenched in widespread policy, custom, and budgetary decisions.

The year before Title IX was passed, only about 294,000 girls played high school sports nationwide, compared to nearly 3.7 million boys.[7] That meant that fewer than one in 27 girls participated, while more than one in two boys did. At the collegiate level, women accounted for fewer than 30,000 student-athletes, while men exceeded 170,000.[8] This

7. WBUR, *Title IX, 50 Years Later: Why Female Athletes Are Still Fighting*, https://www.wbur.org/onpoint/2022/06/23/title-ix-50-years-later-why-female-athletes-are-still-fighting (last visited Sept. 12, 2025).

8. National Women's Law Center, *Quick Facts About Title IX and Athletics*, https://nwlc.org/resource/quick-facts-about-title-ix-and-athletics/ (last visited Sept. 12, 2025).

lopsided access was accompanied by unequal opportunities for coaching, training, facilities, and recruitment.

The results of Title IX underscore the depth of the exclusion it sought to remedy. Within a single generation, women's participation in sports skyrocketed. By 1980, just eight years after Title IX, the number of girls in high school sports had risen to nearly 2 million, and by 2019 it reached over 3.4 million. In colleges, female athletes expanded from 30,000 in 1971 to over 215,000 today.[9] These gains did not happen spontaneously; they were the direct result of legal protections recognizing that without sex-separated teams, women would remain on the sidelines. In effect, the statute and its regulatory enforcement built a legal firewall around women's athletics, ensuring that equal opportunity in sports would not be an empty promise.[10] Title IX's promise was simple: women would have a fair chance.

That promise must be preserved.

If biological males are permitted to compete on women's teams, the result is not greater equality but the effective exclusion of women. Every roster spot awarded to a male, every podium finish won by a male body,

9. Axios, *How 50 Years of Title IX Have Changed American Sports*, https://www.axios.com/2022/06/23/title-ix-50-anniversary-women-sports (last visited Sept. 12, 2025).

10. *Equal Opportunity in Education—Title IX of the Education Amendments of 1972; Final Rule*, 40 Fed. Reg. 24,128 (June 4, 1975), https://www.govinfo.gov/content/pkg/FR-1975-06-04/pdf/FR-1975-06-04.pdf [https://web.archive.org/web/20250902170500/https://www.govinfo.gov/content/pkg/FR-1975-06-04/pdf/FR-1975-06-04.pdf] (accessed Sept. 2, 2025).

and every scholarship redirected to a male displaces a woman. Title IX was enacted precisely to prevent this outcome, not to facilitate it. And the displacement is not theoretical. Around the country, examples have already emerged where male-bodied athletes competing in female categories have won championships, set records, or taken qualifying spots that otherwise would have gone to women.[11] Each such instance reverberates beyond the single competition: it discourages women from training, deters them from entering the sport, and signals that their opportunities are contingent and fragile.[12]

Congress never intended Title IX to operate this way. When it permitted sex-separate teams, it did so to create space for women's participation and success in athletics. That structure is the central safeguard of equality, not an exception to it. Without sex-based teams, Title IX's protections collapse, and the statute's purpose, and promise to generations of female athletes, is undone.

The Fourth Circuit should be reversed and women's rights protected.

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11. ABC7, *Transgender Athlete Wins 2 Girls Events at California Track and Field Finals*, https://abc7.com/post/transgender-athlete-wins-girl-high-jump-event-california-track-field-finals/16616175/ (last visited Sept. 2, 2025).

12. Women's Sports Policy Working Group, *578+ Male* Victories in Female Sports: A Nine-Month Tally*, https://womenssportspolicy.org/253-male-victories-in-female-sports/ (last visited Sept. 2, 2025).

III.

This Court recognizes the necessity of stable sex categories, both generally and in athletics.

Judge Agee dissented from the divided panel that ruled in B.P.J.'s favor on the Title IX claim and vacated the district court's judgment for the defendants on the equal protection claim. App.44a. In doing so, he criticized the majority for "inappropriately expand[ing] the scope of the Equal Protection Clause and upend[ing] the essence of Title IX." App.44a. He hoped this Court would "take the opportunity with all deliberate speed to resolve these questions of national importance." App.74a

This Court's own precedents on sex-based classifications supply the controlling framework and confirm that such the statute in question is legally sound, because this Court has *always* operated on the premise that men and women, though subject to different treatment in some contexts, are objectively identifiable groups.

In *Reed v. Reed*, 404 U.S. 71 (1971), the Court struck down an Idaho law preferring men over women as estate administrators, inaugurating modern sex-equality jurisprudence. That case proceeded on the assumption that "men" and "women" were ascertainable categories, rooted in biology. There was no suggestion that sex was fluid or subjective, and the Court's analysis depended on that stability.

The same framework governed *Craig v. Boren*, 429 U.S. 190 (1976), which introduced intermediate scrutiny for sex-based classifications. There, the Court assessed

whether different drinking ages for men and women were justified. Once again, the Court's scrutiny assumed clear categories: "male" and "female." Without that stability, intermediate scrutiny would collapse, because the judiciary could not even identify the group that was allegedly treated unequally.

Subsequent cases confirm this point.

In *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Court upheld a statutory rape law punishing only males on the ground that "the sexes are not similarly situated with respect to the risks of teenage pregnancy." That reasoning depended on the biological differences between male and female bodies. If "sex" were instead a subjective identity, the justification would unravel; the law's structure presupposed objective categories.

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a women-only nursing program as unconstitutional, but even there it emphasized that the problem was perpetuating stereotypes, not recognizing real differences. The Court assumed that "women" meant biologically female, and its entire analysis presupposed that stable definition.

Even in *United States v. Virginia*, 518 U.S. 515 (1996), where the Court struck down Virginia's male-only military program, the Court did not abandon the understanding of sex as biological. Instead, it required an "exceedingly persuasive justification" for excluding women. The ruling rested on the premise that men and women are identifiable categories.

The same has been true in the context of sports.

In *United States v. Virginia*, 518 U.S. 515 (1996), where the Court required an exceedingly persuasive justification for sex-based distinctions, the Court did not deny that real differences between the sexes may justify different treatment in appropriate contexts. The justification in athletics is clear: protecting women's right to fair competition requires safeguarding their category from displacement.[13]

Taken together, these cases form a coherent body of law. Every case—whether striking down exclusions based on stereotype or permitting distinctions based on real differences—has presupposed that "men" and "women" are objectively knowable categories, not personal psychological preferences. Stable classifications are not the enemy of equality—they are its condition precedent. The Fourth Circuit's decision rejecting that framework departs from decades of precedent and threatens to undo the safeguards that make women's athletics possible.

If courts reinterpret the Equal Protection Clause and Title IX to compel inclusion of male-bodied athletes in female categories, they will dismantle the very structure that has allowed women to flourish in athletics for the past fifty years. The firewall Congress and HEW built will collapse, and women will again find themselves marginalized—not because of lack of talent or dedication,

13. Various circuits have also recognized biological distinction between men and women in sports. *See*, *e.g.*, *Clark*, 695 F.2d at 1126; *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993).

but because the law has abandoned them. For half a century, this Court has treated sex in this way: as an administrable, biological category. To abandon that understanding now would unravel a carefully developed area of constitutional and statutory law.

The Fourth Circuit should be reversed and women's rights protected.

CONCLUSION

After more than fifty years of progress, women and girls have come to rely on the assurance that their independent athletic category will remain protected. That reliance has shaped not only the growth of sports programs, but also the educational and career choices of millions of young women. To now reinterpret the Equal Protection Clause and Title IX to compel inclusion of biological males on female teams would not only change the rules of competition, but it would also reverse one of the most successful civil-rights programs in American history.

Courts have long understood that acknowledging biological reality does not demean women but affirms their equal dignity. By ensuring that women's opportunities are not swallowed by men's greater physiological advantages, sex-based classifications in athletics make equality real. To abandon that framework in favor of subjective self-definition would undo decades of settled law, destabilize constitutional doctrine, and extinguish the very opportunities Title IX was enacted to create.

For these and the reasons discussed by the Petitioner-Defendants, this Court should reverse the Fourth Circuit and protect women's rights.

Respectfully submitted,

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